

JEANA LEDOM)	
Claimant)	
VS.)	
)	Docket No. 1,041,038
HASTY AWARDS)	
Respondent)	
AND)	
)	
UNITED FIRE & CASUALTY COMPANY)	
Insurance Carrier)	

Claimant appeals the December 1, 2008, preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was denied workers compensation benefits after the ALJ found that she had failed to prove that she had suffered a work-related injury which arose out of and in the course of her employment, and had failed to provide respondent with timely notice of the alleged accident.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of Jeana M. Ledom's discovery deposition taken September 15, 2008; David A. Smith's deposition taken November 20, 2008, with attachments; Ryan Ficken's deposition taken November 20, 2008, with attachments; the transcript of Preliminary Hearing held November 26, 2008, with attachments; and the documents filed of record in this matter.

1. Did claimant suffer an accidental injury which arose out of and in the course of her employment with respondent?

2. Did claimant provide timely notice of her alleged accidental injury?
3. What is the appropriate date of accident in this matter? Claimant alleges a series of accidents to her low back and lower extremities through her last day worked on June 9, 2008. The ALJ found that claimant had failed to prove both that an accident arising out of and in the course of her employment had occurred, and that claimant provided timely notice of that alleged accident. However, in order to determine the timeliness of the notice, a date of accident must first be determined under K.S.A. 2007 Supp. 44-508(d).

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was hired on April 8, 2008, to work as a trophy assembler for respondent. This required that claimant assemble trophies and place them in boxes. When the boxes were full, claimant would then transport the boxes to the shipping area. The boxes weighed up to 40 pounds. Claimant alleges that during the last week of May 2008, she suffered an injury to her low back with radiculopathy into her left lower extremity. She also suffered numbness in her left leg.¹ Claimant testified that she told her immediate supervisor, David A. Smith, of the accident immediately. She continued performing her job duties, completing her shift and returning to work for respondent every day through June 4, 2008. Claimant also testified that she told Mr. Smith on June 4 that she was hurting and was going to the doctor for her back. On June 5 and 6, claimant called in to the respondent's plant and left a voice mail for Mr. Smith alleging that she was hurting and was going to the doctor for her back pain.

Claimant's discovery deposition was taken on September 15, 2008, at which time she described the injuries she suffered while working for respondent and her conversations with Mr. Smith. Claimant also denied any prior back or leg problems and denied going to a hospital at any time in the previous five years for anything other than migraine headaches and a broken ankle. However, at the preliminary hearing, it was pointed out that claimant went to the Anderson County Hospital on February 6, 2008, and underwent x-rays of her right hip, pelvis and lumbar spine, after a fall at home when claimant slipped on some steps, falling on her rear. The medical reports indicated pain of one week in duration with numbness down her right leg. The x-rays identified narrowing of the L4-5 interspace but were otherwise normal. Claimant returned to the hospital for additional lumbar spine x-rays on February 18, 2008, with disc space narrowing at L5-S1 being displayed. At the

¹ Claimant's Discovery Depo. (Sept. 15, 2008) at 33-35.

preliminary hearing, claimant continued to describe pain in her low back, but the pain was now on the right side.

Claimant was referred by respondent to Terrence Pratt, M.D., for an examination on November 21, 2008. Claimant described the alleged work-related accident and injuries with respondent, but denied any previous injuries to her back or lower extremities, except for the ankle fracture. Claimant also alleged upper extremity numbness bilaterally as a result of the low back injuries with respondent. Claimant had alleged upper extremity injuries from the low back injury when she testified at the discovery deposition. The upper extremity claim is pertinent as, during the examination by Dr. Pratt, claimant was noted to display giveaway weakness of both the upper extremities and lower extremities. Claimant alleged to Dr. Pratt that all of her symptoms in both her upper and lower extremities were the result of the injuries suffered while working for respondent. However, by the time the parties came to the preliminary hearing, claimant's attorney advised that the upper extremity claim was no longer being pursued.

David A. Smith, claimant's supervisor and respondent's plant manager, testified that claimant never advised him of a work-related injury at any time. The first time he was aware that claimant was alleging a work-related injury was upon receipt of the letter from claimant's attorney under date of July 10, 2008. Mr. Smith acknowledged receiving voice messages from claimant on June 5 and 6 regarding the fact that claimant was sick, but there was no indication in the voice mails of any work-related injury. Mr. Smith was the person responsible for hiring claimant originally, and he was the one who terminated her on June 9, 2008. The termination was for job performance, as some of claimant's jobs had been returned to respondent, with the trophies improperly assembled. The jobs had to be reworked and sent out a second time. He testified that at the time of the termination, claimant made no claim for a work-related accident. Mr. Smith also testified that the Kansas Workers Compensation Form 40² was posted at the time clock at respondent's facility.³

Ryan Ficken, respondent's vice president of sales and operations, testified that the Form 40 had been posted by the time clock for at least three years. He also stated that Mr. Smith was the person to whom any work-related injuries were to be reported. The first time Mr. Ficken was made aware that claimant had alleged a work-related injury was upon receipt of the letter from the attorney for claimant. On July 17, 2008, shortly after receipt of the attorney letter dated July 10, 2008, an Employer's Report Of Accident was completed and filed with the Kansas Division of Workers Compensation. Mr. Ficken was involved in claimant's hire, but was not involved in her termination.

² Form K-WC 40.

³ K.A.R. 51-12-2.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁷

Claimant alleges a series of accidental injuries to her low back and lower extremities while working for respondent. Respondent denies being advised of any accident. In situations where witnesses so directly contradict each other, many times it comes down to the credibility of a witness or witnesses. Here, the ALJ determined that claimant's credibility was suspect, as prior physical problems to both her low back and lower extremities, which necessitated medical treatment less than two months before claimant's employment with respondent, were denied by claimant at her September 15, 2008, deposition. The fact that claimant suffered a fall at home, injuring the same body parts as she alleged were injured while at work, is suspect. The fact claimant then denied the home injury, but managed to remember being treated for migraine headaches two years before

⁴ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2007 Supp. 44-501(a).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

her job with respondent indicates a less than honest response by claimant. Additionally, the transfer of the leg symptoms from the left side at the time of claimant's deposition to the right side at the time of the preliminary hearing raises concern in this Board Member's mind, especially considering that the symptoms from the February 2008 home injury involved the right leg. Claimant also denied any prior back or leg problems when she was examined by Dr. Pratt in November 2008.

Claimant alleges that she told her supervisor, Mr. Smith, of the injury and the fact that she was going to the doctor for her back pain. However, Mr. Smith denies any knowledge of this alleged series of injuries until respondent received a letter from claimant's attorney in July 2008. Mr. Smith was aware that claimant was sick, as she left him voice mails to that effect. But, he testified that the voice mails said nothing about a work injury, just that claimant was sick and would not be at work.

Finally, claimant's credibility is questioned considering the allegations that, somehow, claimant's carpal tunnel syndrome was caused by a low back injury with respondent. This, coupled with giveaway weakness in both claimant's upper and lower extremities, casts doubt on the level of truth contained in claimant's testimony. Apparently, the ALJ also questioned claimant's testimony, finding that she was a "less credible witness than Smith" when dealing with physical complaints markedly similar to those claimed from the alleged work injury.⁸

This Board Member agrees with the conclusion of the ALJ that claimant's testimony lacks credibility. Her allegations of a series of work-related injuries is not credible under these circumstances. Therefore, claimant has failed to prove that she suffered an accidental injury or a series of accidents which arose out of and in the course of her employment with respondent.

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection

⁸ Preliminary Hearing Order (Dec. 1, 2008) at 2.

shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.⁹

The ALJ determined that claimant failed to provide timely notice of the accident. However, claimant has alleged a trauma during the last week of May 2008, and a series of injuries through her last day worked, on or about June 9, 2008, as the dates of accident. In order to determine notice, the date or dates of accident must first be determined under K.S.A. 2007 Supp. 44-508(d). Here, claimant was not taken off work nor restricted from performing the work with respondent by an authorized physician. The first criteria to be met under K.S.A. 2007 Supp. 44-508(d) is the date written notice was given to the employer. That notice, in the form of the letter from claimant's attorney, was dated July 10, 2008, and was received by respondent between July 10 and July 17, 2008, the date respondent prepared the Employer's Report of Accident. Regardless of which date or dates between July 10 and July 17 are used, the notice to respondent was within 10 days. Therefore, the determination by the ALJ that claimant failed to give timely notice of the accident is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant did give timely notice of the alleged accident. But claimant has failed to prove that she suffered an accidental injury which arose out of and in the course of her employment with respondent. The denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 1, 2008, should be, and is hereby, affirmed in that claimant has failed to prove that she suffered an accidental injury or injuries which arose out of and in the course of her employment with respondent.

⁹ K.S.A. 2007 Supp. 44-508(d).

¹⁰ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

HONORABLE GARY M. KORTE

c: Jeff S. Bloskey, Attorney for Claimant
James B. Biggs, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge